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10 **IN THE UNITED STATES DISTRICT COURT**
FOR THE NORTHERN DISTRICT OF CALIFORNIA

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12)
13 ROOTS READY MADE GARMENTS CO.) Case No: C 07 3363 CRB
W.L.L.,)
14)
15 Plaintiff,) PLAINTIFF'S TRIAL BRIEF
16 v.)
17 THE GAP, INC., a/k/a, GAP, INC., GAP) Date: September 26, 2008
INTERNATIONAL SALES, INC., BANANA) Time: 2:30 p.m.
REPUBLIC, LLC, AND OLD NAVY, LLC,) Place: Courtroom 8, 19th Floor
18) Judge: Charles R. Breyer
19 Defendants.) Trial Date: October 6, 2008
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21)
22 **PLAINTIFF'S TRIAL BRIEF**
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1 Plaintiff, Roots' Ready Made Garments Co., W.L.L., ("Roots") respectfully
 2 submits this trial brief for the Court's consideration.

3 **I. STATEMENT OF KEY FACTS**

4 **A. Gap Sells The OP Inventory to Roots And Promises In Exchange To Permit
 5 Roots To Sell First-Line ISP Merchandise.**

6 This action arises from Defendant Gap, Inc.'s almost desperate efforts to rid
 7 itself of a large inventory of outdated merchandise, known as overproduction, or "OP," and to
 8 devise a mechanism by which to protect its trademarks in the Middle East with minimal
 9 expenditure of resources on its part. In early 2003, Gap offered to sell the OP inventory to
 10 Roots for \$6 million, promising in exchange to grant Roots the right to sell first-line Gap
 11 merchandise in Roots' own retail stores in Qatar, and to retailers in other territories in the
 12 Middle East and North Africa, under Gap's International Sales Program ("ISP"). Gap
 13 presented the ISP program to Roots as a tremendous opportunity to develop a profitable retail
 14 business in the region. In or about May and June 2003, Roots purchased the OP inventory.

15 Gap proposed that Gabana serve as an intermediary in the transaction between
 16 Gap and Roots, such that Gap would sell the OP inventory (and later the ISP merchandise) to
 17 Gabana, which would then simultaneously resell the merchandise to Roots. Roots purchased the
 18 OP inventory by means of back-to-back wire transfers and letters of credit through which Roots
 19 transferred the funds to Gabana and Gabana simultaneously sent the same amount to Gap. Gap
 20 then shipped the inventory directly to Roots' warehouse in Dubai. Pursuant to an arrangement
 21 devised by Gap, Gap similarly sold first-line merchandise to Gabana, and Gabana
 22 simultaneously re-sold all the merchandise – whether intended for distribution in Qatar or
 23 elsewhere – to Roots by means of a back-to-back letter of credit. Gap shipped all the ISP
 24 merchandise directly to Roots' warehouse, recognizing that Roots would send the goods to its
 25 own stores in Qatar, and to retailers in other territories.

26 **B. Gap's Misrepresents The Purpose Of The ISP Program**

27 Discovery in this action has revealed that during the negotiation of the OP sale,
 28 Gap fundamentally misrepresented purpose of the ISP program to Roots. The ISP program was
 never intended to generate profits sufficient to compensate Roots for its \$6 million investment

1 in the outdated Gap OP inventory. Rather, the program was designed by Gap's legal department
2 to protect Gap's international trademarks by conducting a minimal amount of business in
3 foreign countries. A senior Gap executive described the ISP program as "commercially
4 irrelevant," explaining that the motivation behind the program was always simply to protect
5 Gap's trademarks – not to drive revenue or sales. The director of the ISP program further
6 conceded at his deposition that Gap had no meaningful growth plan for the program, but rather
7 intended to maintain the status quo by providing protection for Gap's trademarks. Gap never
8 disclosed any of these facts to Roots. Had Roots understood the true nature of the program, it
9 would never have agreed to purchase the OP inventory. Nor would it have gone to the expense
10 of setting up its own retail stores in Qatar to sell ISP merchandise.

11 **C. Gap Denies Roots The Benefit of the Bargain By Failing to Permit Roots to**
12 **Sell ISP Merchandise**

13 At Gap's request, Roots' representatives traveled throughout the Middle East and
14 North Africa, touring various potential markets and meeting with scores of local retailers. In the
15 Spring of 2004, Roots, with Gap's approval, began selling Gap OP and ISP merchandise
16 through its own retail stores in Qatar, and to another retailer in the UAE. Although these initial
17 stores were successful, Gap began to stall in approving new retailers and territories in which
18 Roots could sell. Gap reassured Roots that it was not reneging on its agreement with Roots, and
19 would soon allow Roots to enter the other Arabic-speaking countries in the region. Gap's
20 30(b)(6) witness has admitted, however, that Gap never intended to permit Roots to sell ISP
21 merchandise outside of Qatar.

22 On August 10, 2005, Gap terminated the ISP Agreement with Gabana. Because
23 Gap had provided the ISP merchandise for Roots' retail stores (and those of its retail partners in
24 the UAE) solely through Gabana, the termination effectively cut off Roots' access to the first-
25 line Gap goods necessary to run the stores.

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1 **D. Gap Changes Its Business Model in the Middle East and Promises to Make
2 Roots Its Franchisee.**

3 In late 2004 or early 2005, Gap informed Roots that it was considering changing
4 its business model in the Middle East by establishing franchises to operate stand-alone Gap
5 stores. Acknowledging the commitment Gap owed Roots, Ron Young, an executive in Gap's
6 international division, promised Sheikh Faisal Al-Thani, a Roots executive, that if Gap began a
7 franchise business in the Arabic-speaking countries, it would appoint Roots as the franchisee in
8 the region. Young was impressed by the success of Roots' ISP operation in Dubai, and believed
9 that a stand-alone Gap store operated by Roots would be still more successful. In reliance on
10 Young's promises, Roots (i) prepared a study of the potential franchise relationship, and (ii)
11 traveled extensively in the region to explore the possibility of various franchise opportunities.

12 Although Gap did eventually establish franchises in the Middle East, Roots was
13 not made a franchisee. In 2006, Gap appointed Al Tayer Group as franchisee in Kuwait, Oman,
14 Bahrain, Qatar and the United Arab Emirates. In 2007, it appointed Al Hokair as a franchisee
15 for Saudi Arabia. Gap's witnesses have admitted that Gap never actually considered making
16 Roots its franchisee in the Middle East.

17 **II. ROOTS' CLAIMS**

18 Roots will assert six separate claims at trial: (1) "Unfair" business practices
19 under Cal. Bus. & Prof. Code § 17200; (2) "Unlawful" business practices under Cal. Bus. &
20 Prof. Code § 17200; (3) Fraud; (4) Promissory Estoppel; (5) Quantum Meruit; and (6) Quasi-
21 Contract/Restitution. The fraud and quantum meruit claims will be decided by the jury. The
22 promissory estoppel and quasi-contract/restitution claims, and the claims under Cal. Bus. &
23 Prof. Code § 17200 are equitable in nature and will be decided by the court.

24 **A. Roots' Claims Under Cal. Bus. & Prof. Code § 17200**

25 **1. "Unfair" Business Practices**

26 Gap engaged in "unfair" business practices by, *inter alia*, (1) falsely representing
27 the ISP program as an opportunity to establish and grow a profitable retail operation, and failing
28 to disclose that the purpose of the program was to protect Gap's trademark, not to generate
 revenue or sales; and (2) falsely leading Roots to believe that it would be permitted to sell ISP

1 merchandise in its own stores in Qatar and to other retailers in other countries. Gap's conduct
 2 induced Roots to purchase the OP inventory, and to expend money and resources to open its
 3 own retail stores in Qatar and to develop a retail network for Gap merchandise in other countries
 4 in the Middle East.

5 In determining whether a particular practice is "unfair," California courts weigh
 6 "the impact [of the conduct] on its alleged victim, balanced against the reasons, justifications
 7 and motives of the alleged wrongdoer." *Smith v. State Farm Mut. Auto. Ins. Co.*, 93 Cal. App.
 8 4th 700, 718 (2001). Relying on inapposite case law, Gap has argued that the test articulated in
 9 *State Farm* does not apply in this case. Rather, Gap incorrectly suggests that a claim for unfair
 10 business practices must be "tethered" to a constitutional, statutory or regulatory provision.
 11 However, this standard – articulated by the California Supreme Court in *Cel-Tech*
 12 *Communications*, 20 Cal. 4th 163, 186-87 (1999) – "applies only to cases between direct
 13 competitors, not all 'commercial' cases." *See Nat'l Rural Telecommc'n v. DIRECTTV, Inc.*, 319
 14 F. Supp. 2d 1059, 1075 (C.D. Cal. 2003) (collecting cases); *accord Knevelbaard Diaries v.*
 15 *Kraft Food, Inc.*, 232 F.3d 979, 994 (9th Cir. 2000) (holding that *Cel-Tech* standard did not
 16 apply in action between milk producers and cheese maker); *Pegasus Satellite Television, Inc. v.*
 17 *Direct TV, Inc.*, 318 F. Supp. 2d 968, 978 (C.D. Cal. 2004) (concluding that *Cel-Tech* standard
 18 would not apply in action between two businesses if the jury found that they were not
 19 competitors).

20 Although some courts have applied the *Cel-Tech* standard to cases not involving
 21 direct competitors, *see, e.g., Scripps Clinic v. Superior Court*, 108 Cal. App. 4th 917, 940
 22 (2003), this approach "does not comport with the broad scope of section 17200." *Camacho v.*
 23 *Automobile Club of So. Cal.*, 142 Cal. App. 4th 1394, 1402 (2006) ("'Tethering' the concept of
 24 unfairness to existing positive law undercuts the principle that a practice is prohibited as 'unfair'
 25 or 'deceptive,' even if not 'unlawful' or vice versa."). The weight of authority provides that a
 26 claim for "unfair" business practices does not require any underlying predicate claim. *See, e.g.,*
 27 *Progressive W. Ins. Co. v. Superior Court*, 135 Cal. App. 4th 263, 286 (2005) (upholding 17200
 28 claim for "unfair" business practices notwithstanding the fact that complaint did not state a

1 claim for breach of contract, or breach of the implied covenant of good faith and fair dealing).
 2 To the contrary, “a practice may be deemed unfair even if not specifically proscribed by some
 3 other law.” *Blennis v. Hewlett-Packard Co.*, 2008 WL 818526, at *6 (N.D. Cal. Mar. 25, 2008);
 4 *see also People ex rel. Renne v. Servantes*, 86 Cal. App. 4th 1081, 1095 (2001) (statute “give[s]
 5 the court maximum discretion to control whatever new schemes may be contrived, even though
 6 they are not yet forbidden by law.”).

7 Gap’s conduct constitutes “unfair” business practices under the *State Farm*
 8 standard: Gap falsely represented that the ISP program would be an opportunity for Roots to
 9 establish and grow a profitable retail operation, and failed to disclose that the purpose of the
 10 program was to protect Gap’s trademark, not to generate revenue or sales. Gap also falsely led
 11 Roots to believe that it would be permitted to sell ISP merchandise in its own stores in Qatar
 12 and to other retailers in other countries. Gap’s conduct induced Roots to purchase the OP
 13 inventory, and to expend money and resources developing a retail network for Gap merchandise
 14 in the Middle East. Gap’s motives and justifications, moreover, were clearly ill-intentioned:
 15 Gap sought to rid itself of a large quantity of outdated merchandise, and to protect its
 16 trademarks in the region – misleading Roots into believing that it would benefit from the
 17 arrangement so that Gap could accomplish its objectives with little or no expense on its part.

18 **B. “Unlawful” Business Practices**

19 Gap also engaged in unlawful business practices under Cal. Bus. & Prof. Code
 20 § 17200. In its August 29, 2008 order on Gap’s motion for summary judgment, this Court held
 21 that a claim for common law fraud is actionable as an “unlawful” business practice under
 22 section 17200. *See* 8/29/08 Order at 13. Because Roots will establish two separate claims for
 23 fraud, as discussed in Section IV *infra*, Roots will necessarily have a claim for “unlawful”
 24 business practices under section 17200.

25 **III. PLAINTIFF’S QUASI-CONTRACT CLAIMS**

26 **A. Promissory Estoppel, Quantum Meruit, Quasi-Contract/Restitution**

27 *Promissory Estoppel.* In early 2005, Gap made a clear and unambiguous
 28 promise to Roots that, if Gap established a franchise business in the Arabic-speaking countries

1 of the Middle East and North Africa, it would make Roots a Gap franchisee in the region. Roots
 2 reasonably and foreseeably relied to its detriment on this promise by expending money and
 3 resources to prepare a study of the franchise relationship, and traveling extensively in the region
 4 to explore potential markets.

5 *Quantum Meruit.* In reliance on the promise that it would be made a franchisee,
 6 Roots performed services for Gap in good faith and with a reasonable expectation of
 7 compensation. Because it was not made a franchisee, Roots was never compensated for these
 8 services, and is entitled to the reasonable value of the services provided.

9 *Quasi Contract/Restitution.* Roots conferred benefits on Gap: at Gap's behest,
 10 Roots began exploring and developing the franchise opportunity by preparing a study and
 11 traveling in the Middle East to explore potential markets. Gap, however, failed to make Roots a
 12 franchisee as it had promised. Under these circumstances it would be unjust for Gap to retain
 13 the benefits Roots bestowed on it without paying reasonable compensation.

14 **B. Roots' Equitable Claims Were Timely Filed.**

15 All of Roots' equitable claims were timely filed within the applicable two-year
 16 statute of limitations. *See Cal. Code Civ. Proc. § 339(1).* In asserting that the claims are time-
 17 barred, Gap fundamentally misconstrues the events that trigger the running of the limitations
 18 period. “[A] statute of limitations begins to run no earlier than upon accrual of the cause of
 19 action, which is upon the occurrence of the last essential element.” *Chambers v. Kay*, 106 Cal.
 20 Rptr. 2d 702, 719 (2001), *aff'd* 29 Cal. 4th 142 (2002); *see also J.W. Van Hook v. Southern Cal.*
 21 *Waiters Alliance*, Local 17, 158 Cal. App. 2d 556, 565 (1958) (claim does not accrue until “the
 22 moment when the party owning it is entitled to begin and prosecute an action thereon”). Roots
 23 timely filed its promissory estoppel and quasi-contract claims within two years of the date the
 24 claims accrued.

25 Gap has previously suggested that the promissory estoppel claim is time-barred
 26 to the extent it is based on promises made prior to June 25, 2005. This argument incorrectly
 27 assumes that a promissory estoppel claim accrues immediately when the promise is made. A
 28 promise is only one element of the claim. The plaintiff must also show: (1) reasonable and

1 foreseeable reliance on the promise; and (2) a resulting injury. *See J.W. Van Hook v. Southern*
 2 *Cal. Workers Alliance, Local 17*, 158 Cal. App. 2d 556, 570 (1958). Roots' promissory
 3 estoppel claim did not accrue when Gap *made* its promises, but rather when Gap *breached* the
 4 promises, causing injury to Roots. *See Chambers v. Kay*, 106 Cal. Rptr. 2d 702, 719 (citing
 5 *Budd v. Nixen*, 6 Cal. 3d 195, 200-201 (1971)) ("Until the defendant's conduct causes damages
 6 to the plaintiff, no cause of action has been generated and the period of limitations is not
 7 triggered."). Thus, the statute of limitations for Roots' promissory estoppel claim began to run
 8 until Gap breached its promise to make Roots a franchisee.

9 "[A] suit for breach of an implied contract, which is the essence of a quantum
 10 meruit claim," likewise "accrues at the time of the breach." *Kramer v. Thomas*, No. CV 05-
 11 8381 AG, 2006 WL 4729242, at *14 (C.D. Cal. Sept. 28, 2006). As for the restitution claim,
 12 although Gap received various benefits at Roots' expense throughout the course of their
 13 business relationship, Gap's obligation to make restitution was not triggered until "the
 14 circumstances [were] such that . . . it [was] *unjust* for [Gap] to retain [the benefits]." *McBride v.*
 15 *Boughton*, 123 Cal. App. 4th 379, 389 (2004) (emphasis in original). Thus, Root's quantum
 16 meruit and quasi-contract/restitution claims likewise did not accrue before Gap cut off Roots'
 17 supply of first-line Gap merchandise in August, 2005.

18 All three claims were timely filed within two years of the date of accrual.

19 **C. Gap Is Equitably Estopped From Invoking The Statute of Limitations
 20 Because It Induced Roots To Refrain From Filing Suit.**

21 Gap's statute of limitations defense is also fails on the ground of estoppel. Under
 22 California law, a defendant who represents that "actionable damage has been or will be repaired,
 23 thus making it unnecessary to sue" is estopped from invoking the statute of limitations. *Lantzy*
 24 *v. Centex Homes*, 31 Cal. 4th 363, 383-384 (2003). The record shows that Gap promised that it
 25 would compensate Roots for its injuries, thus making it unnecessary for Roots to file suit.
 26 Specifically, Roots' owner, Mr. Al-Thani, testified that after Gabana filed suit against Gap, in
 27 2006, Ron Young advised him that because Roots did not file a suit against Gap, Gap would
 28 compensate Roots for its losses. Young reiterated his earlier promise to make Roots a
 franchisee, although in a smaller territory than was previously promised. Thereafter, Roots'

1 attorney had further discussions with Young regarding Roots' potential suit against Gap. The
 2 record establishes that after Gabana brought its lawsuit, Gap persuaded Roots not to file its own
 3 suit, by falsely asserting that it would cure Roots injuries by granting it franchise rights. Gap is
 4 therefore estopped from invoking the statute of limitations as a bar to Roots' equitable claims.

5 **IV. PLAINTIFF'S FRAUD CLAIMS**

6 Roots will demonstrate at trial that Gap defrauded Roots in two separate ways:
 7 (1) by falsely promising to make Roots a franchisee in the Middle East and North Africa if Gap
 8 established a franchise business in this region, and (2) by misrepresenting the purpose and scope
 9 of the ISP program and/or failing to disclose material facts uniquely within Gap's knowledge
 10 concerning the program.¹

11 *False Promise.* Under California law, "where a promise is made without [the
 12 intention to perform], there is an implied misrepresentation of fact that may be actionable
 13 fraud." *See Lazar v. Superior Court*, 12 Cal. 4th 631, 638 (1996). Gap's representative, Ron
 14 Young, made an unequivocal promise to Roots' principal, Sheikh Faisal Al-Thani, that if Gap
 15 switched from a wholesale to a franchise model in the Middle East, it would appoint Roots as
 16 the franchisee in the region. In reliance on that promise, Roots prepared a market study, and
 17 also traveled extensively in the region to investigate potential markets. Gap's own witness have
 18 admitted, however, that Gap never actually considered making Roots Gap's franchise. Gap's
 19 promise, which was false when made, is therefore actionable as fraud.

20 *Misrepresentation and Concealment.* Gap also defrauded Roots by
 21 misrepresenting the ISP program as an opportunity for Roots to establish and grow a profitable
 22 retail business for Gap merchandise. In reliance on Gap representations, Roots purchased the
 23 OP inventory at an above-market price, and established its own multi-brand retail stores in Qatar
 24 to sell first-line ISP merchandise. Gap's witnesses have conceded, however, that Gap regarded

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 26 ¹ This Court's August 29, 2008 order granting in part and denying in part Gap's motion
 27 for summary judgment ("Summary Judgment Order") does not address Roots' fraud claim
 28 based on Gap's misrepresentation and concealment of material facts relating to the ISP program.
 On September 12, Roots filed a motion for leave to seek reconsideration of the Summary
 Judgment Order to the extent it fails to address this claim.

1 the program as “commercially irrelevant,” and that the company had no aggressive growth plan
 2 for the program. The purpose of ISP was to protect Gap’s foreign trademarks, not to generate
 3 revenue or sales. Gap never disclosed this information (which was uniquely within Gap’s
 4 knowledge) to Roots.

5 “[N]ondisclosure or concealment may constitute actionable fraud: . . . [1] when
 6 the defendant had exclusive knowledge of material facts not known to the plaintiff . . . , or [2]
 7 when the defendant makes partial representations but also suppresses some material facts.”
 8 *LiMandri v. Judkins*, 52 Cal. App. 4th 326, 336 (1997). Because participation in the ISP
 9 program was to be the primary consideration for Roots’ \$6 million payment for the OP
 10 inventory, the fact that the ISP program was intended for trademark protection, not commercial
 11 profit, was highly material. Indeed, had Gap disclosed the true nature of the ISP program, Roots
 12 would never have agreed to pay \$6 million for the OP inventory to acquire the right to sell ISP
 13 merchandise. As this information was both material and uniquely within Gap’s knowledge, the
 14 failure to disclose it was fraudulent.

15 Gap was also obligated disclose the true purpose of the ISP program because
 16 Gap’s representations about the ISP program were, on their own, misleading. Gap’s failure to
 17 disclose “facts which materially qualify those stated” is also actionable as fraud. *Vega v. Jones,*
 18 *Day, Reavis & Pogue*, 121 Cal. App. 4th 282, 294 (2004) (internal quotations omitted).

19 Roots’ fraud claim based on Gap’s misrepresentations concerning the nature of
 20 the ISP program are not barred by the parol evidence rule. The parol evidence rule precludes a
 21 fraud claim based on “prior or contemporaneous statements at variance with the terms of a
 22 written integrated agreement.” 8/29/08 Order at 12 (emphasis added). But Gap’s fraudulent
 23 misrepresentations and concealment of material information concerning the ISP program are in
 24 no way inconsistent with the terms of the written agreements between Gap and Gabana. The
 25 Gap-Gabana agreements are entirely silent as to the purpose of the ISP program. The parol
 26 evidence rule therefore has no application to Roots’ fraud claim.

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1 **V. CONCLUSION**

2 In sum, Roots seeks all legal and equitable relief to which it is entitled under its
3 fraud, quasi-contract, and Cal. Bus. & Prof. Code § 17200, claims, including restitution, and
4 compensatory and punitive damages.

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7 Dated: September 19, 2008

/s/
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